

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

MARCUS TODD DRAKE,

Plaintiff,

vs.

GREAT FALLS REGIONAL
PRISON, CMDR. DAN O'FALLON,
UNIT MNGR. MR. HARRIS, D.O.
LENAHAN, and D.O.C. MONITOR
MR. HATTON,

Defendants.

CV-17-00126-GF-BMM-JTJ

ORDER

Plaintiff Marcus Drake, a prisoner proceeding pro se, filed a Complaint (Doc. 2) and motion for appointment of counsel (Doc. 14). Drake's claims arose during his incarceration in the Great Falls Regional Prison. The Court must conduct a preliminary screening of the allegations set forth in the pleading as required under 28 U.S.C. § 1915(e)(2). Section 1915(e)(2) requires dismissal of the action if the allegations fail to state a claim upon which relief could be granted. 28 U.S.C. § 1915(e)(2)(B)(ii).

United States Magistrate Judge John Johnston entered Findings and Recommendations in this matter on June 1, 2018. (Doc. 15.) Neither party filed

objections. When a party makes no objections, the Court need not review *de novo* the proposed Findings and Recommendations. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1986). This Court will review Judge Johnston’s Findings and Recommendations, however, for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

The Eight Amendment prohibits cruel and unusual punishment in penal institutions. *Wood v. Beauclair*, 692 F.3d 1041, 1045-46 (9th Cir. 2012) (citation omitted). Whether a specific act constitutes cruel and unusual punishment depends on the “evolving standards of decency that mark the progress of a maturing society.” *Id.* Sexual harassment or abuse of an inmate by a corrections officer violates the Eight Amendment. *Id.* Sexual harassment claims that allege brief inappropriate touching by a correctional official are generally, however, found to be noncognizable, particularly if the alleged touching occurred pursuant to an authorized search. *See Berryhill v. Schriro*, 137 F.3d 1073, 1076 (8th Cir. 1998).

Drake alleges Officer Lenahan brushed his hand and forearm across Drake’s genitals and when Drake tried to shift away, Officer Lenahan grabbed his private area and grinned at him in a menacing way. Drake alleges this incident caused fear, stress, and anguish. Judge Johnston correctly determined that the conduct of which Drake complains does not prove objectively sufficiently serious to violate the

Eighth Amendment. (Doc. 15 at 7.) The Complaint shall be dismissed. Amendment of the Complaint would not cure the defect.

The Court has reviewed Judge Johnston's Findings and Recommendations for clear error. The Court finds no error in Judge Johnston's Findings and Recommendations, and adopts them in full.

IT IS ORDERED that Judge Johnston's Findings and Recommendations (Doc. 15), are ADOPTED IN FULL.

IT IS ORDERED that this matter is DISMISSED.

IT IS ORDERED that the Clerk of Court shall close this matter and enter judgment in favor of the Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS ORDERED that the Clerk of Court shall have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith. No reasonable person could suppose an appeal would have merit. The record makes plain the Complaint lacks arguable substance in law or fact.

IT IS FURTHER ORDERED that the Clerk of Court shall have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) because Drake failed to state a claim upon which relief may be granted.

DATED this 18th day of June, 2018.

A handwritten signature in blue ink, reading "Brian Morris". The signature is written in a cursive style with a large initial "B" and a long horizontal stroke at the end.

Brian Morris
United States District Court Judge